SINGAPORE REPORT

N. GOVINDASAMY v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Winslow and Kulasekaram JJ.) April 6, 1976]

[Singapore — Criminal Appeal No. 8 of 1975]

Penal Code, s. 300, Exception 1 — Murder — Defence of grave and sudden provocation — Rejected by trial judges — Burden of proof.

Evidence — Defence of grave and sudden provocation — Burden of proof — Quantum — Evidence Act (Cap. 5), ss. 3 and 105.

In this case the appellant had been convicted of murder. The trial judges rejected the defence of grave and sudden provocation. They found that the appellant had inflicted the seven fatal wounds found in the head of the deceased with the intention of causing the death of the deceased. They disbelieved his version that he had acted under grave and sudden provocation. They also found that the provocative conduct of the deceased as related by the appellant in his unsworn statement from the dock did not entitle the appellant to the benefit of Exception 1 of section 300 of the Penal Code because the retaliation on his part was not commensurate with the degree of provocation given by the deceased. They found that the medical evidence showed that the appellant acted with gross and savage violence on an unarmed man.

Held, dismissing the appeal: (1) the court accepted the findings of fact of the trial judges and therefore rejected the contention of the appellant that on all the evidence the retaliatory acts of the appellant were proportionate to the provocation given by the deceased which was of a character which affected the appellant's religion, his daughter's honour and his conduct as a father;

(2) the learned trial judges were correct in holding that the burden of proof on the issue of grave and sudden provocation was the burden in civil cases on a balance of probabilities.

[**Editorial Note:** The Privy Council dismissed the appellant's Petition for special leave to appeal on July 22, 1976.]

Cases referred to:-

(1) *Jayasena* v. *Reginam* [1970] 1 All E.R. 219.

(2) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 90.

COURT OF CRIMINAL APPEAL.

Datuk David Marshall for the appellant.

Lawrence Ang Boon Kong (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J. (delivering the judgment of the Court): The appellant was found guilty by the High Court of the offence of murder under section 300 of the Penal Code and was sentenced to death. We dismissed his appeal against his conviction and now proceed to give our reasons for dismissing his appeal.

The relevant facts are these. The deceased, Mohamed Azad, a Muslim, was at the date of his death on November 16, 1974 a young man aged 29 who had graduated from the University of Singapore in 1968. In 1971 he came to know a Hindu girl, Deva Kumari, who was then a second year student at the University of Singapore. She was the third child of the appellant, who owned a packing and transport business.

Before she met the deceased, Deva Kumari had been estranged from her father, the appellant, and had in October 1970 left the house and shortly thereafter taken up residence at Eusoff College at the University Campus. Her mother was not involved and continued to keep in touch with her and to bring home cooked food to her at week-ends. In November 1974 Deva Kumari, who was then in her final year at the University, was living in a hostel at Lloyd Road. By then the rift between father and daughter had lessened to the extent that he paid for the expenses of her visiting India in June 1974 for six weeks to join her mother who had gone to India in May 1974. When his wife was away in India, the appellant used to bring food, which he had himself cooked, to his daughter at her hostel at week-ends and on some week-ends she would go home, 40 Kerbau Road, to have her meals. During that period the appellant had, living with him, his youngest daughter, a Primary Six student. He had three other children all of whom in 1974 were studying outside Singapore. On November 7, 1974 the youngest daughter also went to India to join her mother and at the date of the offence the appellant was living alone at 40 Kerbau Road.

Deva Kumari, through the deceased, came to know a fellow Arts student, Myrna Thomas and M. Arunachalam who had graduated from the University and the four of them became close friends. The deceased and Deva Kumari became secretly engaged sometime in February 1972. Her parents did not know of the engagement but her close friends Myrna Thomas and Arunachalam knew of it. The deceased never visited Deva Kumari's parents at 40 Kerbau Road and she never introduced him to them even as a friend although the engaged couple had planned to get married after she had graduated from the University. At the time of his death, the deceased was employed as an executive of Singapore Airlines Ltd.

One evening in October 1974 an incident occurred at the Lloyd Road hostel. Deva Kumari and the deceased returned to the hostel at about 11 p.m. and found the appellant and his youngest daughter waiting there for her. The appellant accused Deva of associating with a lot of men and asked her who the deceased was. She told him that the deceased was a friend who was helping her in her studies. The appellant told her not to return to his house any more and left. This was the first time that he had seen the deceased.

The following day, the appellant went with his youngest daughter to the hostel at 7 p.m. He apologised to Deva for his behaviour on the previous night and wanted to know who the deceased was. He also asked her to go home for lunch during the week-ends. She told him who the deceased was and told him the deceased's name and place of work. However, she refused to return home for lunch at week-ends, and in spite of his pleading, she continued to refuse.

On November 10, 1974 Deva returned to her hostel at about 7 p.m. and found the deceased there. He told her that he had just had a conversation with the appellant who was waiting in his car to see her. She spoke to the appellant who wanted to know why she had not gone to the airport on November 7 to see her younger sister off to India. She said she had classes to attend and could not go to the airport. The same night she met the deceased at the Coffee House of a hotel and there he related to her the conversation he had with the appellant. The appellant had asked him whether he was a Christian or a Muslim.

On November 14, 1974 Deva spoke to the deceased over the telephone and was told that he was meeting the appellant, at the appellant's request, the next day at 5.30 p.m. at the Hilton Hotel Coffee House as the appellant wanted to talk with him. They met as arranged and later that evening the deceased related to Deva what transpired at their meeting. The meeting, as related by the deceased to Deva, was a cordial one and the talk centred around sociology, social work and political science and the appellant was told by the deceased that they were just good friends and had no marriage intentions.

On the morning of November 16, 1974 the deceased told Deva over the telephone that the appellant had asked him to pick up a diary at No. 40 Kerbau Road the contents of which would confirm her feelings for the deceased. She told the deceased she did not keep a diary and he would be crazy to go to her father's house. They met for lunch with Myrna Thomas and Arunachalam and the deceased was again advised not to go to No. 40 Kerbau Road. The deceased agreed to accept the advice and said he would arrange to meet the appellant at the Tivoli Coffee House between 3.30 and 4 p.m. instead. Deva and the deceased went to her hostel after lunch and there he told her that he was not so much interested in whether she had kept a diary as to see her father and to maintain rapport with him. Later at about 3.30 p.m. the deceased made a telephone call to No. 40 Kerbau Road. Deva had given him the telephone number and when he was speaking over the telephone Deva was near by but could not hear clearly what the deceased said. After the telephone call the deceased told her that as her father could not leave his house he would go to meet her father at No. 40 Kerbau Road. He then left her having arranged to see her at her hostel at 7.30 p.m. and to dine with her, Myrna Thomas and Arunachalam at Shangri-La Hotel. The time was then around 3.40 p.m. At that time he was carrying a brief case.

At 7.30 p.m. when the deceased did not show up at her hostel Deva telephoned his house and spoke to his mother who did not know where he was. Deva waited at the hostel. Soon after 9 p.m. Myrna came in her car to the hostel from the Shangri-La Hotel and in her presence Deva telephoned to No. 40 Kerbau Road. There was no answer. At 9.30 p.m. she again telephoned and on hearing her father's voice at the other end she hung up as she did not wish to speak to him. Subsequently Arunachalam joined Deva at her hostel and the three of them waited there for the deceased. At about 11 p.m. Myrna Thomas and Arunachalam drove to No. 40 Kerbau Road. Arunachalam went to the front door and called out the appellant's name. The appellant appeared at the front window and Arunachalam after introducing himself asked whether the deceased had visited the appellant that afternoon. The appellant told Arunachalam that the deceased had come to collect a book and after a drink had left at 5 p.m.

Arunachalam then returned to the hostel and they waited for the deceased till 1 a.m. when they went in Myrna's car back to No 40 Kerbau Road. Arunachalam again went to the front door, called out the appellant's name and when he appeared spoke to him asking him if he could explain where the deceased might have gone to. The appellant told Arunachalam that the deceased had told him he was going to attend a National Service meeting and also suggested that the deceased had probably gone away for the week-end.

After this second conversation Arunachalam, Myrna Thomas and Deva drove to the Kandang Kerbau Police Station and a police sergeant Katoni, as a result of what he was told, went to No. 40 Kerbau Road arriving there at about 3.20 a.m. The police sergeant asked the appellant whether the deceased had visited him. The appellant replied that the deceased had visited him on November 16, had taken away a book on religion and had left at about 5 p.m. for the Tivoli Coffee House.

Later that day Arunachalam made a formal report at the Kandang Kerbau Police Station to the effect that the deceased was missing and gave a full description of the deceased. At 2 p.m. that day Deva accompanied by Myrna Thomas and Arunachalam went to No. 40 Kerbau Road. On this occasion she spoke to her father asking him where the deceased was. Her father replied that the deceased had come, had a drink, taken a book and left to meet some friends at the Tivoli Coffee House. She then went to the first floor to see if the deceased was there. Then she and her friends left.

As a result of the formal report made by Arunachalam the police began official investigations to find the deceased. Sgt. Tang interviewed the appellant on November 18, 1974 and recorded two statements made by the appellant. These statements read as follows:—

"I have known Mr. Mohd. Azad for about a month. That was on the occasion when I brought food to my daughter at 64 Lloyd Road a hostel where she is staying. She had been staying away from my house about 4 years ago and that was on an occasion where she came late one night and I scolded her. She felt offended and moved out from my house to stay on her own.

That was the time when she attended University of Singapore. My wife was worried about her and asked me to stop scolding her in future and she would be home again. I consoled her by telling her that she would not be able to pay for her studies in the University and she would be back in about 10 days time. However, she failed to return home and I understood from my wife that she was staying at Thomson Road. Though we could not see eye to eye, she returned home to visit my wife during my absence. Three months later she started seeing me again in my house but we were still not on talking terms. During her absence, she still asked me presents through my wife and I gave her what she asked for.

During my daughter's absence from home, my wife used to ask us to send food to her. It was at Lloyd Road that I first met Azad. That was in October one night when I brought food to her at about 19.30 hours. When I arrived there, my daughter was not in. I waited for her inside my car with my youngest daughter. At about 23.35 hours I saw her coming out from a taxi with Azad. I questioned her as to why she came home so late and she told me that she was attending a dinner party. I then questioned again as to who Azad was and she only told me that he was her friend and teaching her in her studies. I did not question her any further and left home with my youngest daughter.

On November 5, 1974 at about 17.30 hours she rang up to my youngest daughter and asked her whether she would like to accompany her to see the show 'Ben Hur'. However she told her that she would not be able to do so as I had bought her a ticket for the 'Exorcist' but she would call over to her place when she was on the way for the show. On November 6, 1974 at about 18.15 hours I brought my youngest daughter there. Arriving there, I saw Azad

sitting on a field reading some books and Deva was waiting for us at the entrance. I did not speak to any of them but my youngest daughter was having a conversation with her about her journey to India. We left about 10 minutes time. On November 11, 1974 I went over to see Deva at Lloyd Road to question her as to why she failed to turn up at my house at weekend. Arriving there at about 18.30 hours I failed to see her as she was not in but Azad was there alone. I then called Azad to my car and started a conversation with him. I told him that since he is a Muslim and Deva is a Hindu it is not possible for both of them to get married. He told me that he knew about it and so far as they are concerned they are clean. He took the trouble to teach her in her studies because he is her friend. The conversation lasted for about 20 minutes, and before I drove him to Lido Cinema as he was having an appointment with someone I noticed that the light in Deva's room was on. I then told Azad that and he went in to see her for about 15 minutes. They came out together and Azad left us. I then asked her as to why she failed to return home for food at week-ends and if she did not wish to have food at my house she would better let me know as I would not cook for myself alone. She then told me that if that was the case, she chose to eat on her own. I then left for home. On November 15, 1974 at about 14.30 hrs. Azad rang me up at home and requested to see me at Hilton coffee house at 17.30 hrs. I met him there at the appointed time and and we discussed about families and social problems. I then told him that I am having a book telling how children were spoilt and also touching on religious affairs. He told me that he was interested in that book and asked me to lend it to him. I told him that I did not know where I had kept it but should I find it, I would ring him up. On November 16, 1974 at about 11.30 hrs. I rang him up in his office to inform him that I have found the book but he was not in and I left behind a message for him to contact me at my office. At about 12.00 hrs. he rang up at my office and enquired what I wanted from him. I told him that I have found the book and if he was interested in it, he could have it. He told me he liked to have it and would call over at my house between 16.00 hrs. to 17.00 hrs. At about 14.45 hrs. he rang up at my house and requested for the book. I told him to call over at my house to have it but he requested me to have it sent down to 'Tivoli' coffee house which I refused as I was having business talk at that time. I also told him that moreover it was he who was interested in the book and not me. He agreed and said that he would call over at my house between 16.00 hrs. to 17.00 hrs.

At about 16.40 hrs. he came alone in a taxi and I was waiting for him in the hall. I invited him into my house and offered him a drink. I told him that he looked tired and he told me that he was as he was busy working the 10 years contract with the police so that he would not be called up for national service. He left later telling me that he was going back to Tivoli coffee house as he had friends waiting for him there. I then accompanied him out of the house and I noticed that he was walking towards Serangoon Road. I then went in my house. At about 23.30 hrs. Arun called at my place and asked me whether I had spoken something to Azad which would upset him. I told him that I did not and he asked me whether I knew where Azad was as he failed to keep up an appointment with him. I told him that it was most probable that Azad was at Deva's place. He then left me. On November 17, 1974 at about 0200 hrs. Arun called at my house and informed me that they had checked with all known friends but still could not trace him. He also informed me that his parents were upset and they were going to lodge a police report. I told him that there was no other way out and it was better for them to do so. He then left me."

"I wish to state further that the book which I gave to Azad bears the title of 'Which Religion?' I could not remember who the author was but it touches on children's problems and the different practices of the various religions. I presumed that Azad was interested in that book because I have told him about Deva's behaviour resembling that what the book relates. It is in this respect most probably that Azad had taken an interest to read it."

On November 21, 1974 a gunny sack with a human foot protruding from it was found floating in the sea near a jetty at Kallang. The police recovered the sack and in it was a decomposed body in a sitting position with flexed legs tied together and hands tied together below the front of the right knee. A brother of the deceased identified the body as the deceased's. A post mortem performed on November 22, 1974 revealed seven fatal wounds on the vertex of the head all of which had penetrated through the skull bone. A chopper which was found by the police at No. 40 Kerbau Road could, according to the pathologist who performed the post mortem, have caused all the seven cut wounds. There were many other injuries found on the deceased some of which according to the same pathologist were defensive injuries and according to him all the seven head injuries were caused by downward blows, four of which were inflicted from behind the deceased.

The appellant made two cautioned statements to the police and these read as follows:—

"We had a fight. He was telling story all about my daughter Deva. It was very unbearable and that I am a bad father. He also talked about his religion. Azad then struck me with his fist and I fought back. We fell and I saw a chopper by the side and I do not know how I used it."

"On November 16, 1974 a Saturday, at about 4.40 p.m. Azad came to my house. He came and sat outside. I gave him a drink. He then asked me where is the book. I said come and I will show you the book. We walked to the back. We brought our drinks along and started to talk. I asked him how long he had known Deva. He said about her first year in the University as there was gossip that she was disowned by her father. He said that he did not pity her but wanted to assist her. He also said that there were two or three Sikh gentlemen in the University running wild after her. He said he tried to help her and managed to keep her from the three Sikh gentlemen. Since then he was working with her all the time. He said that from the University hostel, she moved into the convent. He said they had been going about regularly and decided not to be afraid of others if they were seen by other people. During this period Pathman and Arun came into her life and he advised her to tell them off. He said that Deva was already in his grip and I and my wife cannot do anything. He said we were already decided to get married after her education. I then asked him about the religion. Azad said that she was prepared to come to his side. He started to talk about his religion and insulted mine. I became very hot and began scolding him. He got up and punched me. I punched him back and I fell. I got up and he again started to punch me. With my might, I gave him one more and we fell on the ground. The chopper was there and I cannot remember how I used it. I only saw blood on him. I did not know what to do and have no other way but to dispose off the body."

Human blood stains were found in and around the airwell at the rear portion of No. 40 Kerbau Road as well as on the chopper recovered from the premises.

At the trial the appellant elected to and made an unsworn statement from the dock which he read out. His defence was one of grave and sudden provocation. Exception 1 of section 300 of the Penal Code provides as follows:—

"*Exception 1.* — Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

Explanation. — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact."

This is an extract of what he said from the dock:—

"While we were talking he opened his brief case and took his cigarettes out of it. As I had said earlier I wanted to find out more about Deva, her behaviour and what sort of friends she was keeping. I never objected to their friendship at all. We discussed at first in general, religion, marriage

and parental responsibilities. I noticed that he assumed an air of intellectual superiority as he was a university graduate and I was not. I felt a little slighted at his tone and the subject of Deva cropped up. He again talked generally about Deva, her studies, her behaviour and her activities. I expressed to him my concern for her and her studies. I was not at all happy that she should stay in the hostel as there was no control or restriction imposed on the residents. I told him that I felt that her going out late at night would leave very little time for her studies. Azad replied that Deva had managed all along without any control or restrictions and she would be able to manage. He went on further to say why should I especially at this stage when she was about to finish her final show this unusual concern. He became emotional. I became angry and scolded him that he had no right to talk to me like that. We exchanged hot insulting words and I must have mentioned something about his religion and words to the effect that what right had he a Muslim to interfere with a Hindu girl's life.

I felt angry as a father who brought this child up for 20 years and he had just known her. He then said that I was a bad father to have left my daughter to fend for herself for so many years and that he had been looking after her. I became increasingly furious. He was also angry. He said that he was going to marry my daughter and that I or my wife could do nothing about it. This shocked and angered me even more as I had not realised till then that their relationship had yet reached such a stage. I scolded him for hiding all this. We exchanged insulting words about each other and about our religion and finally in the heat he said that my Hindu daughter, because of my neglect, could have slept with many men and even he could have and can sleep with her. I cannot remember the precise words of all that was said but I was hot with anger and I lost my head. I blew up and I remember moving towards him and he punched me. I became even more hot and crazy with anger and punched him. We exchanged blows. We fell near the staircase at the kitchen. The chopper was there within my reach and I picked it up and in my rage I struck him. I do not know how I used it. I was in a rage and my mind was crazy with anger.

The whole thing happened so quickly and all within the confines of the area near the staircase and the gas stove. I came to my senses some time later and was in a state of shock. I was still holding the chopper and was sitting next to the body. He was slumped by the chair near the stairway very near the granite grinder. I was horrified at what I had done in that moment of frenzy."

The trial judges rejected the defence of grave and sudden provocation. They found that the appellant inflicted the seven fatal wounds found on the head of the deceased with the intention of causing the death of the deceased. They disbelieved his version that he had acted under grave and sudden provocation. They also found that the provocative conduct of the deceased as related by the appellant in his unsworn statement from the dock did not entitle the appellant to the benefit of Exception 1 of section 300 of the Penal Code because the retaliation on his part was not commensurate with the degree of provocation given by the deceased. Their finding was that the medical evidence showed that the appellant acted with gross and savage violence on an unarmed man.

With these findings of fact we entirely agreed and accordingly we rejected the contention of the appellant that on all the evidence the retaliatory acts of the appellant were proportionate to the provocation given by the deceased which was of a character which affected the appellant's religion, his daughter's honour and his conduct as a father.

The other contention of the appellant we need advert to is the contention that the trial judges were wrong in law in holding that the burden of proof on the issue of grave and sudden provocation was the burden in civil cases on a balance of probability. The burden of proof is governed by section 105 of the Evidence Act which provides:—

"105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."

The other relevant section of the Evidence Act which deals with proof is section 3 which provides:—

"3.—(3) A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

The point raised by the appellant has been settled by the Privy Council and we need refer to two of its decisions, one on appeal from Ceylon (as it was then known) where the above statutory provisions are identical with ours, and the other on appeal from Malaysia, where the statutory provisions are also identical with ours. In the Ceylon case, *Jayasena* v. *Regina*[1] the Board rejected the contention that on the true construction of section 105 of the Evidence Act of Ceylon and the meaning of 'burden of proving', the burden imposed by section 105 is merely the burden of adducing some evidence in support of the general or special exception in the Penal Code. The Privy Council held that "it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by section 105 can be anything less than proof in accordance with section 3."

In the Malaysian case, *Public Prosecutor* v. *Yuvaraj*[2] the Privy Council was considering the construction of the words "unless the contrary is proved' in section 14 of the Prevention of Corruption Act, 1961 of Malaysia which provides:—

"14. Where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved."

At page 92 Lord Diplock who delivered the judgment of the Board said:—

"Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being 'disproved' there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordship's opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities."

Accordingly, for these reasons we dismissed the appeal.

Appeal dismissed.

Solicitors: *David Marshall.*